

MICHAEL OVERACKER,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

)
) No. CV-11-3017-CI
)
) ORDER GRANTING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
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JURISDICTION

On August 15, 2006, Plaintiff protectively filed a Title XVI application for supplemental security income, alleging disability beginning March 20, 2003. Tr. 14; 128. In his application for benefits, Plaintiff reported that he stopped working due to several conditions including right shoulder injury, and injury to his left leg and rib. Tr. 145. Plaintiff's claim was denied initially and

1 on reconsideration, and he requested a hearing before an
2 administrative law judge (ALJ). Tr. 65-94. A hearing was held on
3 July 28, 2009, at which Vocational Expert Daniel R. McKinney, Sr.,
4 and Plaintiff, who was represented by counsel, testified. Tr. 28-
5 54. ALJ Robert S. Chester presided. Tr. 26. The ALJ denied
6 benefits on September 21, 2009. Tr. 14-25. The instant matter is
7 before this court pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript
10 of proceedings and are briefly summarized here. At the time of the
11 hearing, Plaintiff was 45 years old, and lived in a mobile home with
12 his disabled parents. Tr. 32. He completed the sixth grade, when
13 he quit school to care for his schizophrenic mother. Tr. 32.
14 Plaintiff has worked as a warehouse and cannery worker. Tr. 48-49.

15 Plaintiff was injured while working for a winery in March 2005.
16 He was moving an "extremely large extension ladder from one 18,000
17 gallon wine tank to another," when it fell and he tried to brace it
18 with his body. Tr. 49. He heard his shoulder and neck both crunch.
19 Tr. 41. Plaintiff testified that as a result, he has "massive pain
20 all the time" in his back, down through his arms, and in his ribs
21 and legs. Tr. 33. He said he has carpal tunnel syndrome and he
22 wears a wrist brace nearly all the time. Tr. 33. Plaintiff also
23 testified that he has braces for his left knee and his right ankle.
24 Tr. 38. He also testified that he takes medication for pain, muscle
25 spasms and depression. Tr. 34-35. He estimated that where ten is
26 the worst pain imaginable, his pain level is usually an eight, all
27 day long, despite his medications. Tr. 35. Plaintiff testified
28 that ever since he was hurt, his pain "has been there." Tr. 45.

1 Physical therapy helped somewhat. Tr. 45. Plaintiff uses a TENS
2 unit three to four times per week, when his pain becomes unbearable.
3 Tr. 35. On those days, he said he has to lie down, off and on, for
4 up to four or five hours. Tr. 36. He does not sleep well due to
5 pain, and he is unable to hold things in his hands for a long time.
6 Tr. 36. Plaintiff said he can lift and carry up to ten pounds, he
7 can walk a couple of blocks before he has to stop to rest, and
8 despite the fact that his driver's license is suspended, he drives
9 on occasion. Tr. 37; 43-44. Plaintiff said his depression makes
10 him isolate himself up to seventy times per month, and he has spent
11 entire days in his room without leaving it. Tr. 39.

12 Plaintiff helps his parents by doing dishes, cooking and
13 performing household chores. Tr. 43. He smokes half a pack of
14 cigarettes a day and said he has not used alcohol since his DUI in
15 2004. Tr. 44.

16 ADMINISTRATIVE DECISION

17 At step one, ALJ Chester found Plaintiff had not engaged in
18 substantial gainful activity since August 15, 2006, the onset date.
19 Tr. 16. At step two, he found Plaintiff had the following severe
20 impairments: degenerative disc disease of the cervical spine; carpal
21 tunnel syndrome, neck and right shoulder injury. Tr. 16. At step
22 three, the ALJ determined Plaintiff's impairments, alone and in
23 combination, did not meet or medically equal one of the listed
24 impairments in 20 C.F.R., Subpart P, Appendix 1(20 C.F.R.
25 416.920(d), 416.925 and 416.926). Tr. 21. In step four findings,
26 the ALJ found Plaintiff's statements regarding pain and limitations
27 were not credible to the extent they were inconsistent with the
28 Residual Functional Capacity ("RFC") findings. Tr. 20. The ALJ

1 found that Plaintiff was unable to perform any past relevant work,
2 but has the RFC to perform light work, except that he can only
3 occasionally climb ladders, ropes or scaffolds, kneel, crouch or
4 crawl and can frequently handle, feel and reach with his right
5 dominant hand. Tr. 19; 23. Finally, after considering Plaintiff's
6 age, education, work experience, and residual functional capacity,
7 the ALJ concluded jobs exist in significant numbers in the national
8 economy that the Plaintiff can perform, such as hand packager and
9 cashier. Tr. 24.

10 STANDARD OF REVIEW

11 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
12 court set out the standard of review:

13 A district court's order upholding the Commissioner's
14 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
15 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
16 Commissioner may be reversed only if it is not supported
17 by substantial evidence or if it is based on legal error.
18 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
19 Substantial evidence is defined as being more than a mere
20 scintilla, but less than a preponderance. *Id.* at 1098.
21 Put another way, substantial evidence is such relevant
22 evidence as a reasonable mind might accept as adequate to
23 support a conclusion. *Richardson v. Perales*, 402 U.S.
24 389, 401 (1971). If the evidence is susceptible to more
25 than one rational interpretation, the court may not
26 substitute its judgment for that of the Commissioner.
27 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
28 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,
resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
3 Nevertheless, a decision supported by substantial evidence will
4 still be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Browner v. Secretary*
6 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
7 substantial evidence exists to support the administrative findings,
8 or if conflicting evidence exists that will support a finding of
9 either disability or non-disability, the Commissioner's
10 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
11 1230 (9th Cir. 1987).

12 SEQUENTIAL PROCESS

13 The Commissioner has established a five-step sequential
14 evaluation process for determining whether a person is disabled. 20
15 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
16 137, 140-42 (1987). In steps one through four, the burden of proof
17 rests upon the claimant to establish a prima facie case of
18 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
19 This burden is met once a claimant establishes that a physical or
20 mental impairment prevents him from engaging in his previous
21 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
22 claimant cannot do his past relevant work, the ALJ proceeds to step
23 five, and the burden shifts to the Commissioner to show that (1) the
24 claimant can make an adjustment to other work; and (2) specific jobs
25 exist in the national economy which claimant can perform. *Batson v.*
26 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
27 If a claimant cannot make an adjustment to other work in the
28 national economy, a finding of "disabled" is made. 20 C.F.R. §§

1 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

2 **ISSUES**

3 Plaintiff contends that the ALJ erred by: (1) finding Plaintiff
4 was not credible; (2) finding Plaintiff's depression non-severe; (3)
5 failing to fully develop the record; (4) improperly rejecting Dr.
6 Deramo's medical opinions; and (5) failing to meet his burden at
7 Step 5 to identify specific jobs, available in significant numbers,
8 that Plaintiff could perform. ECF No. 20 at 9. Defendant contends
9 the ALJ's decision is supported by substantial evidence and free of
10 legal error. ECF No. 25.

11 **DISCUSSION**

12 **A. Credibility.**

13 Plaintiff contends that the ALJ did not provide "clear and
14 convincing" reasons for rejecting his subjective complaints.
15 Additionally, Plaintiff contends that the ALJ failed to identify the
16 testimony that was not credible and the evidence that undermined
17 Plaintiff's complaints. ECF No. 20 at 16.

18 To determine whether the claimant's testimony regarding the
19 severity of symptoms is credible, the ALJ may consider, for example:
20 (1) ordinary techniques of credibility evaluation, such as the
21 claimant's reputation for lying, prior inconsistent statements
22 concerning the symptoms, and other testimony by the claimant that
23 appears less than candid; (2) unexplained or inadequately explained
24 failure to seek treatment or to follow a prescribed course of
25 treatment; and (3) the claimant's daily activities. *Smolen v.*
26 *Chater*, 80 F.3d 1273,1284 (9th Cir. 1996). Absent affirmative
27 evidence of malingering, an ALJ cannot reject a claimant's testimony
28 without giving "clear and convincing" reasons. *Smolen*, 80 F.3d at

1 1283-84. "The ALJ must specifically identify what testimony is
2 credible and what testimony undermines the claimant's complaints."
3 *Morgan*, 169 F.3d at 599. The fact that a claimant's testimony is
4 not fully corroborated by the objective medical findings, in and of
5 itself, is not a clear and convincing reason for rejecting it. See
6 *Smolen*, 80 F.3d at 1285. If the ALJ's credibility finding is
7 supported by substantial evidence in the record, "the court may not
8 engage in second-guessing." *Thomas v. Barnhart*, 278 F.3d 947, 959
9 (9th Cir. 2002); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir.
10 1989)("credibility determinations are the province of the ALJ").

11 Contrary to Plaintiff's assertions, the ALJ provided several
12 reasons that supported the finding that Plaintiff's testimony was
13 not credible. The ALJ identified "significant inconsistencies" that
14 existed between Plaintiff's testimony and the medical records
15 regarding Plaintiff's pain level. Tr. 20. Additionally, the ALJ
16 cited Plaintiff's daily activities as contradicting the reported
17 severity of his pain, Plaintiff's claim he wore wrist braces 24
18 hours per day, seven days a week, and Plaintiff's refusal to have
19 surgery. Tr. 20-21.

20 The record reveals Plaintiff's testimony about his constant
21 pain level is contradicted by treatment notes. Tr. 35; 45; 252-70.
22 SSR 96-7p requires that in considering a claimant's credibility, the
23 ALJ consider, among other things, the consistency of the claimant's
24 testimony with the medical record and with the claimant's own prior
25 statements. SSR 96-7p also states, however, that "symptoms may vary
26 in their intensity, persistence, and functional effects, or may
27 worsen or improve over time, and this may explain why the individual
28 does not always allege the same intensity, persistence, or

1 functional effects of his or her symptoms."

2 At the hearing, Plaintiff testified that the pain was "usually
3 about 8 [out of 10] all day long, even with my meds." Tr. 35.
4 Plaintiff also testified that his pain has been an 8 since he was
5 hurt. Tr. 45. As the ALJ noted, treatment records indicate
6 Plaintiff reported his pain was decreasing, and even estimated his
7 back pain at zero in April 2008. Tr. 20; 252; 260-61; 281; 341.
8 The record supports the ALJ's finding that Plaintiff's testimony
9 regarding his persistent pain level was inconsistent with treatment
10 records, and this was a proper factor for the ALJ to rely upon in
11 assessing Plaintiff's credibility.

12 Additionally, the ALJ properly considered daily living
13 activities in his credibility analysis. If a claimant engages in
14 numerous daily activities involving skills that could be transferred
15 to the workplace, the ALJ may discredit the claimant's allegations
16 upon making specific findings relating to those activities. See
17 *Fair*, 885 F.2d at 603; see also *Morgan*, 169 F.3d at 600 (claimant's
18 ability to fix meals, do laundry, work in the yard, and occasionally
19 care for his friend's child was evidence of claimant's ability to
20 work). In this case, the ALJ found Plaintiff's daily activities
21 could not be performed if his symptoms were as severe as he claimed.
22 Tr. 21. Specifically, the ALJ cited Plaintiff's activities of
23 providing assistance to his parents with household chores such as
24 dishes, vacuuming, laundry, taking his father shopping for
25 groceries, caring for two dogs, fishing with his father two to three
26 times per year, driving, shopping, and outdoor gardening. Tr. 20-
27 21. The ALJ provided specific findings related to Plaintiff's daily
28 activities that were supported by substantial evidence and, thus,

1 the ALJ properly evaluated the testimony.

2 Finally, the ALJ relied upon the fact that Plaintiff had
3 declined to have surgery for his neck condition and his carpal
4 tunnel syndrome, and at the hearing, Plaintiff's wrist braces
5 appeared "very clean and unworn." Tr. 20. In assessing
6 credibility, an ALJ may also consider an unexplained failure to
7 follow treatment recommendations and testimony by the claimant "that
8 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,
9 1039 (9th Cir. 2008). Based upon the ALJ's observations,
10 Plaintiff's assertion that he constantly used the recommended wrist
11 braces was not credible.¹

12 The ALJ's findings related to Plaintiff's refusal to have
13 surgical procedures on his neck and wrists is problematic. It is
14 improper to deny benefits on the basis of declined surgery, when
15 surgery is only suggested rather than a prescribed course of
16 treatment. See *Teter v. Heckler*, 775 F.2d 1104, 1107 (10th Cir.
17 1985) (a claimant's refusal to undergo surgical treatment is not a
18 sufficient reason to deny benefits where surgery was at most
19 recommended or suggested but not prescribed by a physician); see
20 also *Young v. Califano*, 633 F.2d 469, 472-73 (6th Cir. 1980)
21 (unwillingness to undergo a suggested surgery does not constitute
22 failure to follow prescribed treatment). In this case, although
23 plaintiff's testimony reflects that one doctor may have suggested
24 the possibility of surgery for Plaintiff's neck issues, the medical
25 evidence does not indicate that surgery was ever prescribed, and a
26 second opinion indicated that surgery was not in Plaintiff's best

27 ¹ The recommended wrist brace observations by the ALJ has not
28 been addressed by the parties.

1 interest. "That various physicians suggested [an] operation does not
2 necessarily mean that they prescribed it." *Schena v. Health & Human*
3 *Services*, 635 F.2d 15, 19 (1st Cir. 1980). Moreover, an ALJ must
4 examine the circumstances to determine if Plaintiff's reasons for
5 refusing surgery are reasonable. See, e.g., *Nichols v. Califano*,
6 556 F.2d 931, 933 (9th Cir. 1977) ("A claimant under a disability
7 need not submit to all treatment, no matter how painful, dangerous,
8 or uncertain of success, merely because one physician believes that
9 a remedy may be effective.") In determining whether a claimant's
10 refusal to undergo treatment is reasonable, i.e., supported by
11 justifiable cause, several factors are considered, including the
12 physician's outlook as to the success of the treatment, the nature
13 of the treatment or surgery, the severity of the claimant's ailment,
14 and a claimant's age, background, and medical history. *Nichols*, 556
15 F.3d at 933.

16 However, notwithstanding the aforementioned legitimate
17 credibility findings, the ALJ's other purported reason for his
18 adverse credibility finding - that Plaintiff declined to undergo
19 surgery - is not a valid reason for discounting Plaintiff's
20 credibility under these circumstances. A Plaintiff may decline
21 prescribed treatment if he or she provides an "acceptable reason"
22 for failure to follow the treatment. 20 C.F.R. § 404.1530(c). In
23 this case, the Plaintiff explained that the first surgeon who
24 suggested back surgery was inexperienced, and the second opinion
25 from a surgeon at Harborview Hospital in Seattle indicated that
26 Plaintiff was not a surgical candidate. Tr. 41. The record
27 supports Plaintiff's assertions. Tr. 370, 375. With regard to
28 Plaintiff's wrist surgery, he testified that he was "scared of it"

1 because his father had recently had back surgery and as a result,
2 his father was wheelchair bound and had a leg amputated. Tr. 43.
3 It is not clear from the treatment notes in the record whether
4 Plaintiff's refusal to undergo the surgeries was reasonable.
5 Therefore, the ALJ's reliance on this reason for his adverse
6 credibility finding was improper.

7 Nevertheless, the ALJ's misplaced reliance on Plaintiff's
8 failure to seek surgical treatment in discounting credibility was
9 "harmless." See *Batson*, 359 F.3d at 1195-97 (ALJ erred in relying
10 on one of several reasons in support of an adverse credibility
11 determination, but such error was harmless because the ALJ's
12 remaining reasons and ultimate credibility determination were
13 adequately supported by substantial evidence in the record). The
14 ALJ's error does not "negate the validity" of his ultimate
15 credibility finding, and the ALJ's decision remains "legally valid,
16 despite such error." See *Carmickle v. Comm'r, SSA*, 533 F.3d 1155,
17 1162 (9th Cir. 2008)(internal quotations and citation omitted).

18 **B. Step Two: Depression.**

19 Plaintiff contends that the ALJ improperly dismissed his
20 depression as groundless at step two. ECF No. 20 at 11. Plaintiff
21 argues that the evidence established that he experienced significant
22 depression due to his pain because depression had an impact on his
23 pain. ECF No. 20 at 12. Additionally, Plaintiff said he would
24 isolate himself for several days per month due to his depression and
25 pain, and therefore the impairment caused more than a slight
26 limitation on his ability to work. ECF No. 20 at 12.

27 At step two of the sequential evaluation, the ALJ determines
28 whether a claimant suffers from a "severe" impairment, i.e., one

1 that significantly limits his physical or mental ability to do basic
2 work activities. 20 C.F.R. §§ 404.1520, 416.920(c). To satisfy
3 step two's requirement of a severe impairment, the claimant must
4 prove the existence of a physical or mental impairment by providing
5 medical evidence consisting of signs, symptoms, and laboratory
6 findings; the claimant's own statement of symptoms alone will not
7 suffice. 20 C.F.R. §§ 404.1508, 416.908. In addition, the
8 impairment must last, or be expected to last, for a continuous
9 period of at least 12 months. 20 C.F.R. §§ 404.1509, 416.909
10 (durational requirement). The fact that a medically determinable
11 condition exists does not automatically mean the symptoms are
12 "severe," or "disabling" as defined by the Social Security
13 regulations. See, e.g., *Edlund*, 253 F.3d at 1159-60; *Fair*, 885 F.2d
14 at 602-03; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

15 At step two, a claimant must make a threshold showing that his
16 medically determinable impairments significantly limit his ability
17 to perform basic work activities. See *Bowen*, 482 U.S. at 145; 20
18 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers
19 to "the abilities and aptitudes necessary to do most jobs." 20
20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of
21 impairments can be found 'not severe' only if the evidence
22 establishes a slight abnormality that has 'no more than a minimal
23 effect on an individual's ability to work.'" *Smolen*, 80 F.3d at
24 1290(quoted SSR 85-28). "[T]he step two inquiry is a de minimis
25 screening device to dispose of groundless claims." *Id.* (citing
26 *Bowen*, 482 U.S. at 153-54).

27 In determining whether a claimant's impairments are severe at
28 step two, the ALJ evaluates the medical evidence and explains the

1 weight given to the opinions of acceptable medical sources in the
2 record. SSR 85-28. If the medical source is an examining or
3 treating physician, the Commissioner must provide "clear and
4 convincing" reasons for rejecting an uncontradicted opinion.
5 *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v.*
6 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the opinion is
7 contradicted, it can only be rejected for "specific" and
8 "legitimate" reasons that are supported by substantial evidence in
9 the record. *Andrews*, 53 F.3d at 1043. Where a medical source
10 opinion is based primarily on a claimant's self-reported symptoms,
11 credibility is an appropriate factor to consider in the evaluation
12 of medical evidence. *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir.
13 2005).

14 The ALJ found that Plaintiff's "medically determinable mental
15 impairment of depression does not cause more than minimal limitation
16 in the claimant's ability to perform basic mental work activities
17 and therefore is nonsevere." Tr. 17. The ALJ reviewed the four
18 broad functional areas and found that none of the impairments caused
19 more than mild limitations. Tr. 17. In assessing Plaintiff's
20 performance in the four functional areas, the ALJ relied upon
21 Plaintiff's admissions in his Function Report. Tr. 17; 132-39.

22 To the extent that the ALJ found that Plaintiff's depression
23 was not severe, this court must affirm that finding if substantial
24 evidence supports a finding that the medical evidence clearly
25 established that Plaintiff's depression was only a slight
26 abnormality with a minimal effect on Plaintiff's ability to work.
27 See *Webb*, 433 F.3d at 687. The record supports the ALJ's
28 determination. For example, on January 29, 2008, Plaintiff told

1 Mark Deramo, M.D., that he had some depression. Tr. 202. Dr.
2 Deramo noted Plaintiff's reported depression, and indicated that it
3 was stable. Tr. 203. Similarly, on May 19, 2008, Plaintiff
4 reported that he was doing well with medication for depression, and
5 he indicated that he did not want to change: "feels management is
6 good now, not interested in any changes." Tr. 198. On January 5,
7 2009, Plaintiff reported his depression was "bad," but Mark Deramo,
8 M.D., noted that a test measuring depression assigned a rating of 4
9 out of 27. Tr. 413. At that visit, Dr. Deramo did not include
10 depression among Plaintiff's diagnoses. Tr. 414.

11 Plaintiff alleged that his depression caused him to remain
12 inside his room 70 times per month, but the ALJ properly found
13 Plaintiff's overall credibility was lacking. Tr. 17. Additionally,
14 the ALJ noted Plaintiff admitted he was able to visit friends two to
15 three times per month. Tr. 17. The evidence supports the ALJ's
16 determination that Plaintiff's depression did not amount to a severe
17 impairment.

18 **C. Duty to Develop the Record.**

19 Plaintiff argues that the ALJ failed to fulfill his duty to
20 develop the record. At the administrative hearing, Plaintiff's
21 counsel advised the court that it believed additional medical exams
22 were needed regarding Plaintiff's depression:

23 ALJ: Is there anything else out there that needs to
24 be added to the record?

25 ATTY: Well, we think that the psychological component
26 of the case needs to be developed, but other than that,
27 no.

28 ALJ: All right. Has there been any evaluations that
you're aware of that are not in the record?

ATTY: No, no. It would have to be done by a
consulting exam. There's references in the record with

1 his treating doctor that he does have depression, but no
2 development of that that I'm aware.

3 Tr. 29. Plaintiff argues that the ALJ's failure to order additional
4 testing was error. ECF No. 20 at 13.

5 In Social Security cases, the law is well-settled that the ALJ
6 has an affirmative "duty to fully and fairly develop the record and
7 to assure that the claimant's interests are considered . . . even
8 when the claimant is represented by counsel." *Celaya v. Halter*, 332
9 F.3d 1177, 1183 (9th Cir. 2003) (ellipsis in original) (quoting
10 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983); *Smolen*, 80 F.3d
11 at 1273). "The ALJ's duty to supplement a claimant's record is
12 triggered by ambiguous evidence, the ALJ's own finding that the
13 record is inadequate or the ALJ's reliance on an expert's conclusion
14 that the evidence is ambiguous." *Webb v. Barnhart*, 433 F.3d 683,
15 687 (9th Cir. 2005) (citing *Tonapetyan v. Halter*, 242 F.3d at 1144,
16 1150 (9th Cir. 2001)). "In cases of mental impairments, this duty is
17 especially important." *DeLorme v. Sullivan*, 924 F.2d 841, 849 (9th
18 Cir. 1990).

19 The ALJ has a duty "to scrupulously and conscientiously probe
20 into, inquire of, and explore all the relevant facts" by procuring
21 the necessary, relevant treatment records. *Higbee v. Sullivan*, 975
22 F.2d 558, 561 (quoting *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir.
23 1978)); see also 20 C.F.R. § 404.944 (stating that the ALJ may
24 continue the hearing if he believes material evidence is missing,
25 and may reopen the hearing at any time prior to mailing a notice of
26 decision to receive new and material evidence); 20 C.F.R. §
27 416.1450(d) (providing that the ALJ may issue subpoenas on his own
28 initiative or at the request of a party); 20 C.F.R. § 416.919a

1 (explaining that the Commissioner may order a consultative
2 examination when a conflict, ambiguity, or insufficiency in the
3 evidence must be resolved).

4 In this case, the ALJ had no duty to further develop the
5 record. The medical record does not establish that Plaintiff's
6 depression was so severe as to prevent him from doing any gainful
7 activity. An ALJ "has broad latitude in ordering a consultative
8 examination." *Reed v. Massanari*, 270 F.3d 838, 842 (9th Cir. 2001).
9 Such an examination is necessary when "'additional evidence needed
10 is not contained in the records' . . . and those involving an
11 'ambiguity or insufficiency in the evidence [that] must be
12 resolved.'" *Id.* As indicated previously, no additional evidence was
13 needed; there was no ambiguity or insufficiency present in the
14 available evidence. The ALJ did not err.

15 **D. Medical Opinions.**

16 Plaintiff contends that the ALJ erred by rejecting Dr. Deramo's
17 opinions concerning Plaintiff's depression and how it impacted his
18 chronic pain issues and potential absenteeism. ECF No. 20 at 14.

19 The ALJ considered the opinions of several doctors, including
20 Dr. Deramo and stated that he gave the opinions substantial weight,
21 according to examining and treating status. Tr. 21. Specifically,
22 the ALJ addressed Dr. Deramo's opinion:

23 In June 2008 and January, 2009, the claimant was evaluated
24 by Mark Deramo, M.D., for DSHS purposes. Dr. Deramo
25 opined in both instances that despite the claimant's
carpal tunnel and neck pain diagnoses, he was capable of
light duty exertional work.

26 In March 2009, Dr. Deramo completed a medical report
27 questionnaire at the request of the claimant's
28 representative. Dr. Deramo opined that although the
claimant's physical or mental conditions were reasonably
likely to cause pain, the claimant was capable of work
activities on a regular and continuous basis at a light or

1 sedentary level.

2 Tr. 22.

3 The record supports the ALJ's assessment of Plaintiff's RFC
4 based upon the medical opinions. On October 16, 2008, Dr. Deramo
5 opined that Plaintiff "is unlikely to be able to return to moderate
6 or heavy-duty work, but that he should be okay to do sedentary or
7 light-duty work. . . . The patient does have a history of depression
8 which may also have an impact on his pain and should also be treated
9 appropriately." Tr. 415. On January 5, 2009, Dr. Deramo noted that
10 Plaintiff expressed his depression was "bad," but his Patient Health
11 Questionnaire score was only 4 out of 27. Tr. 413. During that
12 visit, Dr. Deramo did not include depression in Plaintiff's
13 diagnoses. Tr. 414. Instead, Dr. Deramo commented, "Cervical
14 spinal stenosis/carpal tunnel syndrome with chronic pain. I believe
15 the patient currently has moderate interference with work-related
16 activities due to the above diagnoses. I believe he is suitable for
17 light or sedentary duty." Tr. 414. On a form dated March 26, 2009,
18 Dr. Deramo indicated it was unknown how many days on average, per
19 month, of work Plaintiff might miss work, due to medical
20 impairments.² Tr. 412. Dr. Deramo wrote that to answer this query,

22 ² Plaintiff argues that the large circle Dr. Deramo wrote on
23 the page encompasses both "1 day" and "2 days" per month. However,
24 the center of the hand-drawn circle appears to encircle the
25 question, "how many days," and does not suggest an answer. If the
26 evidence can reasonably support either affirming or reversing a
27 decision, the court may not substitute its own judgment for that of
28 the Commissioner. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882

1 Plaintiff would need an Independent Medical Exam or physical
2 activity exam. Tr. 412. The court "must consider the entire record
3 as a whole, weighing both the evidence that supports and the
4 evidence that detracts from the Commissioner's conclusion, and may
5 not affirm simply by isolating a specific quantum of supporting
6 evidence." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir.
7 2007)(internal quotations and citations omitted). Considering the
8 record as a whole, the evidence does not support Plaintiff's
9 assertion that Dr. Deramo opined Plaintiff's impairments would cause
10 him to miss one to two workdays per week. The ALJ gave substantial
11 weight to Dr. Deramo's opinion, and that opinion is consistent with
12 Plaintiff's RFC.

13 **E. Step Five.**

14 Plaintiff contends that the ALJ erred by relying upon an
15 incomplete hypothetical that was posed to the VE. ECF No. 20 at 19.
16 The hypothetical posed to the VE included a similarly situated
17 worker who could work at the light level but was limited to an
18 occasional use of ladders, ropes or scaffolds, occasional kneeling,
19 crouching or crawling and frequent reaching with his dominant hand.
20 Tr. 50. The VE responded that such a person could perform a broad
21 range of sedentary and light unskilled work that would include
22 assembly workers, hand packers and cashiering. Tr. 50-51. When
23 handling and fingering was changed to "frequent," the VE opined that
24 limitation would probably eliminate the assembly occupations, but
25 not the cashiering and hand packer jobs. Tr. 52. When handling and
26 fingering was decreased to "occasionally," the VE opined that "a
27 person who has access only to sedentary jobs, and can't use their

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(9th Cir. 2006).

1 hands bilaterally frequently, continuously would probably only have
2 access to odd lot or [INAUDIBLE] employment." Tr. 52. The VE also
3 testified that an employee who missed more than two days of work at
4 unpredictable times due to pain would not be able to sustain
5 employment. Tr. 52-53.

6 Plaintiff argues that the ALJ's hypothetical was incomplete
7 because it did not properly account for Plaintiff's restrictions in
8 the use of his right upper extremity. ECF No. 20 at 19. Plaintiff
9 cited the September 15, 2003, opinion of Dr. Moran, who stated
10 Plaintiff "will likely wind up with some degree of persistent
11 symptoms or disability from the right shoulder." Tr. 378. While
12 Dr. Moran's 2003 prediction was Plaintiff would have "some degree"
13 of chronic symptoms, the opinion was not specific about the severity
14 of the limitations Plaintiff might experience and, thus, this
15 statement does not support Plaintiff's assertion that he was limited
16 to occasional handling and fingering. Moreover, on October 14,
17 2006, Marie Ho, M.D., examined Plaintiff and opined he was limited
18 to lifting and carrying up to 20 pounds occasionally and 10 pounds
19 frequently, and he could kneel and crouch occasionally. Tr. 183.
20 Dr. Ho indicated Plaintiff had "no other manipulative or
21 environmental limitations." Tr. 183. On October 27, 2006, Bruce
22 Van Fossen assessed Plaintiff with limited restrictions with
23 reaching on his right side, and unlimited restrictions on handling,
24 fingering and feeling. Tr. 187. On January 30, 2007, Norman
25 Staley, M.D., affirmed that opinion. Tr. 192. In short, the record
26 does not support Plaintiff's argument that he was limited to
27 occasional handling and fingering. As a result, Plaintiff's
28 argument that the hypothetical was flawed and the ALJ erred by

1 relying upon a flawed hypothetical fails.

2 **CONCLUSION**

3 Having reviewed the record and the ALJ's findings, the court
4 concludes the ALJ's decision is supported by substantial evidence
5 and is not based on legal error. Accordingly,

6 **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment **ECF No.24** is
8 **GRANTED.**

9 2. Plaintiff's Motion for Summary Judgment **ECF No. 19** is
10 **DENIED.**

11 The District Court Executive is directed to file this Order and
12 provide a copy to counsel for Plaintiff and Defendant. Judgment
13 shall be entered for **DEFENDANT** and the file shall be **CLOSED.**

14 DATED November 30, 2012.

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16 S/ CYNTHIA IMBROGNO
17 UNITED STATES MAGISTRATE JUDGE
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